

**DISSENTING VIEWS
to the Judiciary Committee Report**

on

H.R. 2146, the “Two Strikes and You’re Out Child Protection Act of 2000”

These views dissent from the Committee Report on H.R. 2146. The bill would mandate life imprisonment for a second sex crime involving a child. While it would include crimes committed by sexual predators who may deserve such harsh punishment, it would also include consensual “petting” between high school students who are 18 and 14 years old. Since the bill is limited to cases falling under federal jurisdiction, which covers Native American reservations, national parks and forests, and U.S. territorial waters, it will apply primarily to Native Americans on reservations. The Sentencing Commission data reflected that about 75% of the cases arising under sections of the U.S. Code covered by the bill involved Native Americans.

Background

On March 7, 2002, the full Judiciary Committee marked up H.R. 2146, the “Two Strikes and You’re Out Child Protection Act” and voted to report the bill. During the markup, Rep. Green, the sponsor of the bill, introduced an amendment in the nature of a substitute which had been adopted by the Subcommittee on Crime at its markup following a hearing on the bill on Tuesday, July 31, 2001. The substitute eliminated some of the more egregious sections of the bill as filed, such as those sections mandating a life sentence for a second misdemeanor offense. However, the substitute still mandates a life sentence for relatively minor offenses such as a second offense involving an attempted improper touching (under 18 U.S.C. 2243(a)) of a 14 year old high school sophomore by her 18 year old high school boyfriend, even though it was consensual. It is not unheard of for determined parents to institute charges in such a case and for a just as determined young couple to defy the parents by continuing to see each other. The current law provides for a sentence of up to 15 years for even a first offense under 18 U.S.C. 2243(a), although a first offense of this nature, if prosecuted, would not likely provoke a long prison sentence, if any at all.

Mr. Scott, Ranking Member on the Subcommittee on Crime, offered two amendments during both the Subcommittee and the full Committee markups. The first one would have eliminated the mandatory requirement of a life sentence for a second offense. The second Scott amendment would have allowed tribal governments to opt out of the application of the bill in the same manner as the “three strikes, you’re out” law allows such opt out. Both amendments were defeated by voice votes at both markups, with several Democratic Members speaking in favor of the amendments..

Prior marriage is a defense to prosecutions under 18 U.S.C. 2243(a). In light of this, H.R. 2146 could be considered the ultimate “shotgun wedding” inducement. Interestingly, Under most state laws, parents are allowed to give their 15 year older, for example, consent to marry even a 40 year older, or any age person. However, this bill, regardless of the consent of parents or any other circumstances, mandates a life sentence if a 19 year old teen even attempts to engage in what teens consider “petting” with a 15 year old teen as a second such offense, if they are not married.

Also, H.R. 2146 would have an unintended racial impact in that, since it would affect primarily Native Americans. It would have no effect on the type cases referred to as justification for the bill, such as the Polly Klaus case. That was a state case which this bill would not effect.

In the 106th Congress, H.R. 4047, the “Two Strikes and You’re Out Child Protection Act of 2000” was introduced by Rep. Mark Green. H.R. 2146, the “Two Strikes and You’re Out Child Protection Act” was introduced in the 107th Congress also by Rep. Mark Green on June 13, 2001, and referred to the House Judiciary Committee’s Crime Subcommittee. H.R. 4047 and H.R. 2146, as introduced, are virtually identical, although H.R. 4047 was slightly broader since it included additional items which constituted a “Federal sex offense.” H.R. 4047 was considered by the Crime Subcommittee in a hearing held on May 11, 2000 and on July 25, 2000, passed the House by voice vote, under suspension of the rules. The bill also passed the House as an amendment added to H.R. 1501, the ill-fated Juvenile Justice Reform Act of 1999.

Concerns raised by H.R. 2146

1. Judicial Sentencing Flexibility Eliminated

H.R. 2146 also raises concerns because it eliminates any flexibility in sentencing, even where flexibility may be needed. For example, in cases where family members are involved, treatment and counseling may effectively address the offending behavior in a family context, but H.R. 2146 eliminates the prospect for treatment. Further, in close knit communities such as Indian Reservations, which are subject to U.S. Federal court jurisdiction, the prospect for treatment is also eliminated.

2. Proportionality

The Sentencing Commission has also raised serious proportionality concerns about “two strikes” legislation such as H.R. 2146, because it would require a mandatory life sentence for any person who is convicted of a Federal sex offense in which a minor is the victim if the person has a prior sex conviction in which a minor was the victim.¹ According to the Sentencing Commission, a risk of this type of legislation is that a life sentence could be “mandatory for two defendants convicted of vastly dissimilar crimes.”² The Sentencing Commission cites the example that a defendant convicted of raping a child under the age of 12 using force, who has a prior conviction for a similar offense, currently is subject to a mandatory life sentence under title 18, United States Code, Section 2241(c).³ However, under H.R. 2146, and similar “two strikes” legislation, “a 19 year old defendant who engaged in consensual sex with a 15 year old would be subject to the same life imprisonment if he had a prior statutory rape conviction, or conviction for some other

¹Letter from Diana E. Murphy, Chair, United States Sentencing Commission, to the Hon. Bill McCollum, Chairman of the Crime Subcommittee and the Hon. Robert C. Scott, Ranking Member of the Crime Subcommittee (May 1, 2000).

²Id.

³Id.

prior sex offense in which a minor was the victim,” even though the “seriousness of these two offenses and the harm to the victims could be very different.”⁴

3. H.R. 2146 Could Have a Chilling Effect on Victims Coming Forward

H.R. 2146 could also have a chilling effect on victims coming forward to report crimes if the victim knows the result will be that the perpetrator will be sentenced to life in prison. For example, a family member may be reluctant to turn in another family member if they know that the offender faces a mandatory life sentence. In addition, fear of prosecution under H.R. 2146 could lead to the killing of more victims, since an offender may be aware that the prosecution for such act would result in a mandatory life sentence and since murder would carry a lesser penalty than even “touching” the victim.

Professor Zimring, who testified before the Subcommittee last year in relation to H.R. 4047, pointed out in his testimony how detrimental the imposition of mandatory life sentences could be.⁵ Specifically, Professor Zimring stated (referring to H.R. 894, the “No Second Chance For Murderers, Rapists, or Child Molesters Act of 1999,”): “It [the bill] might also be dangerous. If the bill actually provoked life without parole penalties in the states, and if offenders are highly sensitive to deterrent threats at the margin, a rapist or child sex offender would have little further to lose by eliminating the victim who is often an important witness against the offender.”⁶ Another related issue is that H.R. 2146 might encourage false accusations against previously convicted child sex offenders. This issue was even raised in the Majority’s Memorandum to Members of the Subcommittee on Crime in preparation for the hearing and mark-up of H.R. 2146.⁷

4. H.R. 2146 Is Not Needed

Federal and State courts are already handing down life sentences in certain cases involving sex offenses committed against minors, and title 18 United States Code Section 2241 “Aggravated sexual abuse,” already includes a mandatory life sentence if a defendant is convicted under 2241(c) (With children) for a crime against a minor, and the defendant has previously been

⁴Id.

⁵*Hearing on H.R. 894, the “No Second Chance For Murderers, Rapists, or Child Molesters Act of 1999,” H.R. 4047, the “Two Strikes and You’re Out Child Protection Act,” and H.R. 4147, the “Stop Material Unsuitable For Teens Act,” May 11, 2000, Before the Committee on the Judiciary, Subcommittee on Crime, 106th Cong.* (Statement submitted by Franklin E. Zimring, William G. Simon Professor of Law and Director, Earl Warren Legal Institute, University of California at Berkeley).

⁶Id

⁷ Memorandum to Members of the Subcommittee on Crime from Lamar Smith, Chairman, Subcommittee on Crime, dated June 26, 2001.

convicted of another Federal offense under 2241(c), or of a State offense that would qualify as a crime under 18 United States Code Section 2241. In addition, the Sentencing Commission's amendments, which took effect on November 1, 2001, make it clear that the sentencing guidelines are currently addressing the problem of sex offenses committed against minors, and sentences have increased dramatically for these types of crimes. In fact, according to the U.S. Sentencing Commission, the length of time for sentences currently given by courts for crimes which would fall under H.R. 2146, have almost doubled in recent years.

In a letter from Timothy B. McGrath, Staff Director of the U.S. Sentencing Commission, dated June 26, 2001, written to Chairman Smith and Ranking Member Scott of the Crime Subcommittee, the U.S. Sentencing Commission raised several concerns about H.R. 2146.⁸ Specifically, the Sentencing Commission's main concern is that H.R. 2146 would create unfair disparities in sentences.⁹ The letter also reaffirmed the Sentencing Commission's concerns about the "two strikes" provision as articulated by Chair Murphy in her letter to Representatives McCollum and Scott dated May 1, 2000, concerning H.R. 4047 from the 106th Congress.¹⁰ The letter also served to update the Subcommittee regarding recent actions by the Sentencing Commission that may affect the Subcommittee's consideration of H.R. 2146.

In 2000, the Commission passed a multi-part amendment to the sentencing guidelines covering sexual offenses that provided new sentencing enhancements in several sentencing guidelines.¹¹ Specifically, the new sentencing guidelines provided sentencing enhancements for criminal sexual abuse, criminal sexual abuse of a minor (statutory rape), criminal sexual abuse of a ward, abusive sexual contact, promoting prostitution or prohibited sexual conduct, and sexually exploiting a minor by production of sexually explicit material.¹² These newly enhanced

⁸Letter from Timothy B. McGrath, Staff Director, United States Sentencing Commission, to the Hon. Lamar Smith, Chairman of the Crime Subcommittee and the Hon. Robert C. Scott, Ranking Member of the Crime Subcommittee (June 26, 2001).

⁹Id.

¹⁰ Letter from Diana E. Murphy, Chair, United States Sentencing Commission, to the Hon. Bill McCollum, Chairman of the Crime Subcommittee and the Hon. Robert C. Scott, Ranking Member of the Crime Subcommittee (May 1, 2000).

¹¹Letter from Timothy B. McGrath, Staff Director, United States Sentencing Commission, to the Hon. Lamar Smith, Chairman of the Crime Subcommittee and the Hon. Robert C. Scott, Ranking Member of the Crime Subcommittee (June 26, 2001).

¹²Letter from Diana E. Murphy, Chair, United States Sentencing Commission, to the Hon. Bill McCollum, Chairman of the Crime Subcommittee and the Hon. Robert C. Scott, Ranking Member of the Crime Subcommittee (May 1, 2000).

sentencing guidelines each represent at least a 25% increase in guideline punishment levels.¹³ The amendments also increase the base offense levels in the sentencing guidelines for criminal sexual abuse of a minor if the offense involved the transportation of minors for illegal sexual activity.¹⁴

The guidelines amendments discussed above completed the Sentencing Commission's response to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105-314.¹⁵ In addition, the Sentencing Commission formally submitted an additional amendment to Congress on May 1, 2001, which became effective on November 1, 2001.¹⁶ The new amendment creates a new guideline, Section 4B1.5, which specifically targets repeat sex offenders for significantly increased punishment in proportion to the sentencing guidelines.¹⁷

The first tier of the new amendment, Section 4B1.5(a), is most closely analogous to H.R. 2146 in that it applies to child sex offenders who have an instant offense of conviction for sexual abuse of a minor and a prior felony conviction for sexual abuse of a minor.¹⁸ The Sentencing Commission expects that this new provision will increase sentences significantly for those defendants for whom it will apply.¹⁹ Commission data indicate that there were 24 defendants sentenced in fiscal year 1999 for whom this provision would have applied, and the average sentence of imprisonment will increase by 93.6 percent from 110 months to 213 months.²⁰

The new guideline also contains a "second tier of punishment that in many ways applies more broadly than H.R. 2146 would if it were enacted."²¹ Specifically, "this second tier, Section 4B1.5(b) provides a five-level increase in the offense level and a minimum offense level of 22 for child sex offenders who engage in a "pattern of activity" involving prohibited sexual conduct with

¹³Id.

¹⁴Id.

¹⁵Letter from Timothy B. McGrath, Staff Director, United States Sentencing Commission, to the Hon. Lamar Smith, Chairman of the Crime Subcommittee and the Hon. Robert C. Scott, Ranking Member of the Crime Subcommittee (June 26, 2001).

¹⁶Id.

¹⁷Id.

¹⁸Id.

¹⁹Id.

²⁰Id.

²¹Id.

a minor.”²² In addition, “this second tier is broader in applicability than H.R. 2146 because a conviction for the prior prohibited sexual conduct is not needed to trigger these increased penalties.”²³ The Sentencing Commission expects that this new provision “will increase sentences significantly for those defendants for whom it will apply.”²⁴ “Commission data indicate that there were 57 defendants sentenced in fiscal year 1999 for whom this provision would have applied, and the average sentence of imprisonment will increase by 71.3 percent from 87 months to 149 months.”²⁵

The Sentencing Commission’s amendments from 2000 and 2001, taken together, significantly increase penalties for a variety of sex offenses. In addition, title 18, United States Code, Section 2241 “Aggravated sexual abuse,” already includes a mandatory life sentence if a defendant is convicted under 2241(c) for a crime against a minor, and the defendant has previously been convicted of another Federal offense under 2241(c), or of a State offense that would have been an offense under either such provision had the offense occurred under Federal law. Under these circumstances, the defendant shall receive a mandatory sentence of life in prison.

5. Mandatory Minimums

The premise underlying H.R. 2146 is that tough federal mandatory sentences will solve the problem of sex crimes against minors. The empirical evidence however does not support this premise. Professor Franklin Zimring testified last Congress regarding the evidence in this area and stated that there was none to even suggest that this was true, since federal cases represent such an insignificantly small portion of the child sex crimes in the U.S.

Conclusion

Unlike the “Three Strikes” federal law, H.R. 2146 does not allow tribal governments to opt out of the provisions and apply their laws for handling such matters. This is true despite the fact that there has been no evidence of a failure of the tribes to address the problem appropriately on reservations or other tribal lands. Nor is there any evidence that the problem of sexual assaults against children is particularly rampant in Indian Country or that tribal governments have asked for such a provision as H.R. 2146. This bill is a reflection of a sentencing policy gone haywire. We have messed the policy up so badly with sound byte legislation such as “Aimee’s Law” and “Meagan’s law” that now we see nothing wrong with mandating a heavier penalty for consensual touching between teenagers than we mandate for killing a person.

John Conyers, Jr.
Robert C. Scott
Melvin L. Watt
Sheila Jackson Lee

²²Id.

²³Id.

²⁴Id.

²⁵Id.